IN THE

Supreme Court of the United States

October Term, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN, FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of Health, Education and Welfare of the United States, and HAROLD HOWE, 2d, as Commissioner of Education of the United States,

Appellees.

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Opinions Below

The opinion of the United States District Court for the Southern District of New York, including the dissenting opinion (21a-54a)* is reported in 271 F. Supp. 1. The opinion of Judge Frankel granting plaintiffs' motion to convene a three-judge court (13a-20a) is reported in 267 F. Supp. 351.

* References are to the Appendix printed separately.

Jurisdiction

The decision of the District Court dismissing the complaint herein was rendered and filed on June 19, 1967 (3a). A notice of appeal therefrom was filed on June 26, 1967 (3a). On July 21, 1967, a certification of the record on appeal to this Court was filed (3a), and on October 16, 1967, this Court noted probable jurisdiction.

The jurisdiction of this Court rests on Title 28 of the United States Code, Section 1253.

The Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in part:

> "I. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; * * *"

The relevant provisions of the Elementary and Secondary Education Act of 1965 (P.L. 874, Eighty First Congress) are set forth in the appendix hereto (*infra*, pp. 57-78).

The Question Presented for Review

This appeal presents a single question: Do citizens and taxpayers of the United States have standing to challenge in the Federal courts an expenditure of Federal funds on the ground that it is in violation of the Establishment and Free Exercise provisions of the First Amendment to the United States Constitution?

Statement of the Case

This action was brought by a group of individuals, citizens and taxpayers of the United States and residents of the City and State of New York, challenging the constitutionality under both the "no-establishment" and "free exercise" provisions of the First Amendment of certain expenditures made by the Department of Health, Education and Welfare. The complaint, whose factual allegations must be presumed to be true for the purposes of this appeal, alleges that these expenditures, purportedly made pursuant to the authority of the Elementary and Secondary Education Act of 1965, were used to finance the furnishing of instruction and the providing of instructional materials for use in religious and sectarian schools. The plaintiffs requested judgment declaring these expenditures to be unconstitutional and enjoining further expenditures for these purposes. No request was made for judgment requiring restitution for funds always expended or which will have been expended before issuance of the injunction sought in the action (5a-10a).

Although the prayers for relief in the complaint (9a-10a) are not limited geographically and call for an injunction enjoining the defendants "from approving any program for the expenditure of Federal funds to finance in whole or in part instruction or guidance services in religious and sectarian schools, or the purchase of textbooks and instructional and library materials for use in religious and sectarian schools," it is quite clear that the gravamen of the complaint are the practices in New York City. Paragraph 10 of the complaint (7a) refers specifically to the

practices within the City of New York engaged in by the Board of Education of the City of New York. At the argument before the three-judge court on the motion to dismiss, plaintiffs, through their attorney, expressly stated that this case was to be deemed one limited to the practices of the New York City Board of Education.[1]

It may be assumed that the practices within the City of New York complained of herein are paralleled in other parts of the nation,[2] and that if the plaintiffs are successful in this action the defendants will discontinue such practices wherever they are engaged in throughout the United States. However, as far as the present action is concerned, the defendants, the Secretary of the Department of Health, Education and Welfare of the United States and the Commissioner of Education of the United States, are required to defend only the programs and practices engaged in within the City of New York.

The plaintiffs do not challenge the constitutionality of the Elementary and Secondary Education Act of 1965. Paragraph 9 of the complaint states expressly that "There are many programs within the meaning of Title I of the Elementary and Secondary Education Act of 1965 which could practicably be instituted by local education agencies which would qualify them for the receipt of Federal funds under the Act but which would not violate the provisions of the Federal Constitution. Among these programs are

1. Stenographer's minutes of argument of Leo Pfeffer, page 17, *Flast* v. *Gardner*, 66 Civ. 4102, S.D.N.Y., argued May 25, 1967.

2. See, e.g., complaint in *Carpenter* v. *Gardner*, United States District Court for the Eastern District of Pennsylvania, Civil Action No. 42818 (1967) wherein it is alleged that similar practices are engaged in within the City of Philadelphia.

those to provide pupil health and dental benefits in public and nonpublic schools, and programs for special instruction in courses such as reading, arithmetic, music and art and for guidance conducted on publicly owned premises after regular school hours and open equally to children regularly registered in public and nonpublic schools" (7a).

The complaint further alleges that "the Board of Education of the City of New York, a local educational agency, has in fact instituted and continues to institute and conduct programs such as these and has on the basis thereof in fact qualified for and received Federal funds under Title I of the Elementary and Secondary Education Act of 1965" (7a).

The essence of the complaint insofar as Title I of the Act is concerned is found in paragraphs 12 and 13 which allege that substantial Federal funds under this Title have been and, unless enjoined, will continue to be used "to finance, in whole or in part, instruction in reading, arithmetic and other subjects and for guidance in religious and sectarian schools" (8a). In respect to Title II, paragraph 15 of the complaint alleges that substantial Federal funds are being and will continue to be used, unless enjoined, "to finance the purchase of textbooks and instructional and library materials for use in religious and sectarian schools". (8a).

The District Court, with Judge Frankel dissenting, dismissed the complaint on a single ground: that by reason of *Frothingham* v. *Mellon*, 262 U. S. 447 (1923), the plaintiffs had no standing to bring the action, that there was thus no justiciable controversy and the court therefore lacked juris-

diction of the subject matter. The court rejected the plaintiffs' contentions that *Frothingham* was not based upon absence of constitutional jurisdiction but upon judicial policy, and that the policy considerations which required dismissal in *Frothingham* were inapplicable in a suit based upon the First Amendment. The court likewise refused to agree with the plaintiffs' contention that the facts relating to standing presented in this case are identical with those in *Bradfield* v. *Roberts*, 175 U. S. 291 (1899), and that this Court's acceptance of jurisdiction in that case required the District Court to accept jurisdiction in this one. Finally, although conceding that *Frothingham* has been subjected to criticism, the court held that it had never been overruled or limited by this Court and that accordingly its authority remains unimpaired.

Summary of Argument

Neither *Frothingham* v. *Mellon* nor the *de minimis* principle on which it is based presents an insurmountable constitutional barrier to the present action. The determination that the plaintiff in that suit lacked standing to sue was not a holding that the Federal courts were without jurisdiction under Article III of the Constitution. Nothing in the Court's decision indicates an intent to make such a holding. Moreover, the Court's acceptance of jurisdiction and its decision on the merits in analogous cases establish this clearly, and the overwhelming consensus of respected constitutional authorities reaches the same conclusion.

Frothingham expressed a policy of judicial restraint based on factors which, however valid they may have been

in 1923, have no equivalent validity today. In any event, these factors have no relevance to a suit challenging governmental action in violation of the First Amendment, under both "establishment" and "free exercise." This Court has never upheld the dismissal under *Frothingham* of a citizen's or taxpayer's suit under the First Amendment or indeed any asserting a constitutional claim other than the narrow property right asserted in *Frothingham.*

Numerous weighty policy considerations dictate assumption of jurisdiction in this case. The controversy is one particularly fitted for judicial resolution and there is no other forum for its resolution. If jurisdiction is refused, substantial violations of a fundamental freedom of Americans will be unchecked for want of a technically, legalistically eligible protagonist. Refusal of jurisdiction would go directly contrary to the consistent national trend towards extending the fundamental freedoms of the First Amendment, particularly through expanded judicial protection. It would likewise go contrary to the policy of equalizing, both substantively and procedurally, the judicial protection of rights from infringement by Federal and state governments.

In short, all policy considerations dictate not a refusal but an acceptance of jurisdiction in this case.

ARGUMENT

POINT I

No constitutional barrier precludes acceptance of jurisdiction of a citizen-taxpayer's suit challenging an expenditure of Federal funds as violative of the Establishment and Free Exercise provisions of the First Amendment.

A. The *Frothingham* Decision

The decision of the court below rests upon one decision, and one decision only—*Frothingham* v. *Mellon*. Because of that decision, the court held that "plaintiffs have no standing to bring this action, * * * there is no justiciable controversy and this court therefore lacks jurisdiction of the subject matter" (22a). We respectfully submit that the court below was in error, and that it did not lack jurisdiction of the subject matter of the controversy. An examination of the opinion in *Frothingham* shows clearly that the decision was not based upon want of constitutional jurisdiction.

Frothingham was one of two companion cases reported under the common title of *Massachusetts* v. *Mellon*. Unlike *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), wherein a single decision and opinion was written to cover two companion cases (*Pierce* v. *Society of Sisters* and *Pierce* v. *Hill Military Academy*), separate and independent opinions were written for *Massachusetts* and *Frothingham*, and it was only the accident of simultaneous decision that resulted in the reporting of both under a single case title. A comparison of the two decisions shows clearly that while *Massachusetts*

was based on want of constitutional jurisdiction, *Frothingham* was not.

Both cases were suits to enjoin the enforcement of the Maternity Act of 1921, the former an original suit in the Supreme Court by a State in its own capacity and as representative of its citizens, and the latter a District Court suit by a Federal taxpayer suing in that capacity. The asserted grounds for unconstitutionality were different; in *Massachusetts* it was that the Act impinged upon powers reserved to the states under the Tenth Amendment; in *Frothingham* that the statute constitutes a taking of property without due process of law in violation of the Fifth Amendment. In neither case did the Court reach the merits of the controversy, but from the very beginning of its opinions the Court indicated that the dismissals were based on different grounds. The Court said (at p. 480):

> In the first case, the State of Massachusetts presents no justiciable controversy either in its own behalf or as the representative of its citizens. The appellant in the second suit has no such interest in the subject-matter, nor is any such injury inflicted or threatened, as will enable her to sue.

Justifying its dismissal in the first case, the Court said (*ibid*):

> * * * Under Article III, Sec. 2, of the Constitution, the judicial power of this Court extends "to controversies * * * between a State and citizens of another State" and the Court has original jurisdiction "in all cases * * * in which a State shall be a party." The effect of this is not to confer jurisdiction upon the Court merely because a State is a party, but only where it is a party

to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant * * *.

In distinguishing *Bradfield* v. *Roberts*, 175 U. S. 291 (1899) the Court said (at p. 486):

> * * * The case * * * came here from the Court of Appeals of the District of Columbia, and that court sustained the right of the plaintiff to sue by treating the case as one directed against the District of Columbia, and therefore subject to the rule frequently stated by this Court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. * * * [T]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court. *Crampton* v. *Zabriskie*, 101 U. S. 601, 609. Nevertheless, there are decisions to the contrary. * * * The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. * * * But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

> The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect.

We will shortly indicate that even if the Court was correct in distinguishing *Bradfield* v. *Roberts* from other taxpayers' suits challenging the constitutional validity of Federal expenditures the present suit can be maintained. At this point we suggest only that the reasons for refusing jurisdiction in *Frothingham* as expressed in the above paragraphs are not based upon constitutional incompetence. If they were, the Court could have stated simply (as it did in *Massachusetts* v. *Mellon*) that dismissal was required because of absence of a case or controversy within the meaning of Article III. The reasons given for dismissal in *Frothingham* were:

(1) Equitable jurisdiction to enjoin a wrong will not be exercised where the injury to the protagonist is "indeterminable";

(2) The injury suffered by plaintiff is the same as that suffered by everyone else and therefore is in the nature of a public rather than a private wrong;

(3) The injury to the plaintiff is "minute," and therefore is subject to the old adage *de minimis non curat lex*, an adage which is inapplicable or less applicable where the suit is against a municipality rather than the Federal government;

(4) If the suit were entertained it would open the door to a multitude of similar suits with resulting "inconveniences."

Considering each of these reasons separately we note:

(1) Obviously, refusal of a court of equity to grant injunctive relief where the injury to the plaintiff is indefinite or "indeterminable" refers to a matter of equitable discretion and not constitutional competence.

(2) The reference to the identity of the injury suffered by the plaintiff and that of the public at large may well imply the historic basis for the holding in *Frothingham*, the ancient common law principle that a public nuisance is not subject to judicial action on the part of a member of the general public who has not suffered a particular, non-common injury. Quite clearly, this common law principle does not raise any question of constitutional competence under Article III.

(3) The equally ancient adage of *de minimis* similarly does not rise to the status of a constitutional issue of jurisdiction. If it did, the Court in *Frothingham* would have been required to overrule *Bradfield*, not distinguish it. In both *Frothingham* and *Bradfield*, the actual loss suffered by the plaintiffs in each case was undoubtedly less than a dollar. Quite possibly, it was less than a penny in both cases, but even if it be assumed that it was a dollar in *Bradfield* and only a penny in *Frothingham*, it is difficult to justify constitutional jurisdiction on the basis of a difference of ninety-nine cents. The fact that a taxpayer's interest in an unconstitutional expenditure by a municipality is greater than his interest in a similar expenditure by the Federal government does not mean that the former is also not *de minimis*. The difference between the minute pecuniary losses suffered by the plaintiff-taxpayers in *Bradfield* and in *Frothingham* is itself *de minimis*. The amount of additional taxes imposed on Arch Everson by reason of the fact that the Township of Ewing paid the public bus fares for a few Catholic children attending parochial schools could hardly have risen above *de minimis*, but that fact did not prevent this Court from accepting jurisdiction. *Everson* v. *Board of Education*, 330 U. S. 1 (1947).[3]

(Parenthetically, it may be noted that the most important decision in constitutional law and the one on which this case is based, *Marbury* v. *Madison*, 1 Cr. 137 (1803), was itself the product of a controversy which, measured by pecuniary standards, was not much more than *de minimis*.

3. The total expenditure for the transportation of parochial school students in *Everson* was only $357.74. Transcript of Record, p. 49. The population of the Township of Ewing in 1940 was 10,146. *Everson* v. *Board of Education, supra*, at p. 62, fn. 60. The average cost per resident was therefore about three and a half cents.

Beveridge points out in his biography of Marshall (volume 3, p. 110) that of the seventeen persons whose commissions as justices of the peace were withheld by Madison "thirteen did not join in the suit, apparently considering the office of justice of the peace too insignificant to be worth the expense of litigation. Indeed, these offices were deemed so trifling that one of Adams's appointees to whom Madison delivered a commission resigned and five others refused to qualify.")

Moreover, whatever may have been the situation in 1923 is hardly the same today. In some cases the amount of pecuniary loss suffered by a Federal taxpayer may be substantially larger than that suffered by a municipal taxpayer. Professor Kenneth Culp Davis pointed this out in his testimony before the Senate Judiciary Subcommittee on Constitutional Rights (Hearings on S. 2097, 89th Congress, Second Session, p. 493):

> The Court's reasoning in *Frothingham,* applied to today's tax facts, means that a taxpayer has standing. The Court said that the standing of a municipal taxpayer to challenge a municipal expenditure "is the rule of this court," because the effect on the taxpayer was "direct and immediate." It said that the effect of a Federal expenditure on a Federal taxpayer was "comparatively minute and indeterminable." That was true as of 1923. But it is not true as of 1966. Taxes that almost any corporation pays to the Federal Government are no longer "comparatively minute" as against taxes the same corporation pays to municipalities. General Motors pays a billion and a half to the Federal Government, and it pays no more than a tiny fraction of that amount to any municipality. The tax facts on which the *Frothingham* opinion was based have now turned right around backwards, but the law that was

made lingers on, after its foundation has eroded away. The General Motors stake in a $10-billion program is about $150 million. Because the rule of the Supreme Court since 1879 has been and still is that a municipal taxpayer has standing, and because that rule is clearly sound, a Federal taxpayer should now *a fortiori* have standing.

(4) Finally, it need hardly be argued that rejection of jurisdiction for fear of the "inconveniences" of a multitude of similar suits reflects a policy of judicial restraint and not of constitutional incapacity to act.

The last paragraph in *Frothingham* does not negate the conclusion suggested here that *de minimis* does not present a constitutional barrier to a taxpayer's suit challenging the validity of a Federal expenditure. A court's power to declare a Congressional statute unconstitutional, the Court said, is an incident of its determination of a case before it. "If", the Court said (262 U. S. at p. 488) "a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." Hence, unless the plaintiff has established his standing to bring a law suit, there is no case before the court in which it can declare the statute unconstitutional and enjoin the execution of a judgment notwithstanding the statute. But whether the court will initially accept a case by one whose injury is so small as to be within the class of *de minimis* is an ancient common law question of judicial policy, not one of constitutional capacity.

When the authors of the Constitution wished to give constitutional status to a common law procedural policy they did not lack the means to express themselves, as when they

imposed upon the Federal judiciary the obligation of providing a jury trial and respecting the jury's determination in any common law action where the amount in controversy exceeds twenty dollars. (Amendment VII.) But nothing in Article III or elsewhere in the Constitution indicates an intent to accord constitutional status to the common law procedural principle of *de minimis*.

B. The Pre-*Frothingham* Precedents

That *Frothingham* and the *de minimis* principle on which it is based do not impose a constitutional barrier to citizens' and taxpayers' suits in the Federal court is established conclusively by the fact that such cases have been accepted by this Court both before and after *Frothingham*. Cases in which such suits were entertained and decided on the merits are *Millard* v. *Roberts*, 202 U. S. 429 (1906), *Bradfield* v. *Roberts*, *supra*, *Heim* v. *McCall*, 239 U. S. 175 (1915), *Wilson* v. *Shaw*, 204 U. S. 24 (1907), *Hawke* v. *Smith*, 253 U. S. 221 (1920), and *Coyle* v. *Smith*, 221 U. S. 559 (1911).

Millard v. *Roberts* was a suit against the Treasurer of the United States brought by a resident of the District of Columbia to enjoin the payment to two railroads of $750,000 each on the grounds, first, that the act which authorized the grants was a revenue measure and could therefore constitutionally have originated only in the House of Representatives, and secondly, that it constituted a tax for a private purpose and therefore a deprivation of property without due process of law in violation of the Fifth Amendment. The Court affirmed the judgment for defendant,

holding that the act was not a "bill for raising revenue" within the meaning of Article I, Section 7 of the Constitution, and that its purpose was public rather than private.

Millard v. *Roberts* was a suit by a resident and taxpayer of the District of Columbia, as was *Bradfield* v. *Roberts*. We have suggested that this fact is irrelevant insofar as the question of constitutional capacity is concerned. But even if these suits are deemed actions against a municipality and thus subject to a rule different from that applicable to a suit against the Federal Government, the complaint in the present suit should not have been dismissed, for it too should have been deemed a suit against a municipality. *Bradfield*, we submit, is indistinguishable from the present case in respect to the jurisdictional issue. In that case, a Federal taxpayer, a resident and citizen of the District of Columbia, sued the Treasurer of the United States to enjoin the payment of Federal funds to a hospital, alleged to be sectarian, asserting that the appropriation, which had been made by Congress, violated his First Amendment rights.

That case and the present one are indistinguishable. In both, the funds came out of the general treasury of the United States, and were raised from taxes imposed upon all taxpayers in the United States, not merely local residents. In both, a municipal corporation was used as the means of transferring Federal funds to a sectarian institution; in *Bradfield*, it was the District of Columbia, and in the present case, the Board of Education of the City of New York. The defendant in that case was the Treasurer of the United States; the defendants in this one, the Secre-

tary of Health, Education and Welfare and the Commissioner of Education. In both cases, the defendants were represented by the Attorney General of the United States, and in both the plaintiffs sued as citizens and taxpayers of the United States and as residents of the local area. We submit therefore that, just as the *Bradfield* case was heard on the merits, so too should the present one be.

Heim v. *McCall, supra,* was a suit by a taxpayer of the State of New York against the Public Service Commission to restrain it from complying with a state law providing that only American citizens shall be employed in the construction of public works. The complaint alleged that the statute violated the Fourteenth Amendment to the Federal Constitution and that compliance therewith would raise the cost of public works projects. The Court expressly stated that it assumed that Heim as a taxpayer had "a right of suit" and passed on to the merits, upholding the constitutionality of the state statute.

Even if *Frothingham* can be distinguished on the question of constitutional competence from *Bradfield, Millard* v. *Roberts* and *Heim* v. *McCall* on the ground that these were or could be considered to be suits against a municipality, no such distinction is available in respect of *Wilson* v. *Shaw, supra.* This was a suit by a citizen and taxpayer of the United States residing in Illinois against the Secretary of the Treasury to restrain him from paying out any money for the construction of the Panama Canal. Among the grounds asserted by the plaintiff was that the Government had not legally acquired title to the land on which the Canal was to be built, that it cannot legally build on

land owned by another country, and that the Constitution does not empower the Government to build railroads or canals anywhere. Each of these grounds was considered by the Court and in each case held to be without substantive merit, requiring affirmance of the judgment for the defendant.

It is true that in each of these cases the Court stated that it was assuming but not passing on the question of the plaintiff's standing to bring the suit or raise the substantive issues. We submit, however, that this indicates that the Court deemed standing not a question of constitutional jurisdiction but of judicial policy. Ever since the Court, in 1793, turned down President Washington's request to advise him regarding the international law problems raised by the French Revolution (1 Warren, *Supreme Court in United States History,* 110-111) and *Hayburn's Case,* 2 Dall. 409 (1792), it has been unquestioned constitutional law that a Federal court may not decide where it cannot adjudicate, and that where constitutional jurisdiction is concerned, it is immaterial that no objection is raised by anyone. *Muskrat* v. *United States,* 219 U. S. 346, 354 (1911); *Chicago and Southern Air Lines* v. *Waterman S.S. Corp.,* 333 U. S. 103, 113 (1948); *U. S.* v. *Jefferson Electric Mfg. Co.,* 291 U. S. 386 (1934). *Marbury* v. *Madison, supra,* determined that the Federal courts have only such jurisdiction and powers as are conferred upon them by Article III of the Constitution; hence, a decision by the Supreme Court on a substantive question is an implicit determination that it has jurisdiction under the Constitution to adjudicate the controversy. Constitutional jurisdiction cannot be conferred by consent and therefore the reservation of the questions of the plaintiffs' standing to

sue in *Bradfield* v. *Roberts, Millard* v. *Roberts; Wilson* v. *Shaw* and *Heim* v. *McCall,* could only have contemplated the question of judicial policy, not of constitutional jurisdiction.

No reservation of the question of standing was expressed in *Hawke* v. *Smith,* 253 U. S. 221 (1920). Indeed, none could be since, unlike the other cases, *Hawke* v. *Smith* resulted in a decision by the Court in favor of the taxpayer on the merits. There plaintiff sued the Secretary of the State of Ohio to enjoin as a wasteful expenditure of public funds the printing of ballots for a referendum on whether the State should ratify the Eighteenth Amendment to the Federal Constitution. In reversing the state court's decision, this Court held that the Constitution contemplates ratification of amendments by state legislatures and not by popular referenda.

In *Frothingham,* the Court, in seeking to distinguish *Bradfield,* stated (262 U. S. at p. 487):

> * * * The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. IV Dillon Municipal Corporations, 5th ed. §1580 *et seq.* But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment

out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

Hawke v. *Smith* cannot be so distinguished. A State is not a corporation, public or private, and its taxpayers are not stockholders. It is a sovereign government no less than is the United States, its taxpayers are citizens as are the taxpayers of the United States and the interest of a single taxpayer in the State Treasury "is shared with millions of others" and "is comparatively minute and indeterminable." (The added tax cost to a single taxpayer in the State of Ohio arising out of the one-time expenditure for the printing of referendum ballots certainly did not rise above *de minimis*.)

Nor can any valid distinction in respect to constitutional jurisdiction be based upon the fact that *Frothingham* was a Federally instituted suit while *Hawke* v. *Smith* came to this Court on appeal from a state court. Article III makes no distinction between the "judicial power" of the Supreme Court and of "such inferior courts as the Congress may from time to time ordain and establish." The only difference in respect to jurisdiction between the two tribunals is that between original and appellate determination; not between what may be determined in each. What is not a "case or controversy" within the meaning of Article III when presented in a state court does not become so merely by appeal to this Court. As the Court said in *Doremus* v. *Board of Education*, 342 U. S. 429, 434 (1952):

We do not undertake to say that a state court may not render an opinion on a federal constitutional ques-

tion even under such circumstances that it can be regarded only as advisory. But because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

Finally, we call the Court's attention to the case of *Coyle* v. *Smith, supra*. In that case, the Court accepted jurisdiction and passed on the merits of a taxpayer's suit challenging the act of the Oklahoma legislature in removing the capital of the State from Guthrie to Oklahoma City in violation of a provision in the act admitting Oklahoma into the Union as a State. No reservation of the question of standing or indeed any discussion of it is found in the Court's opinion, thus implicitly recognizing the Court's constitutional jurisdiction to determine the issues on the merits.

Before *Frothingham*, the Court accepted jurisdiction and passed on the merits of the respective controversies in *Bradfield* v. *Roberts*, *Millard* v. *Roberts*, *Heim* v. *McCall*, *Wilson* v. *Shaw*, *Hawke* v. *Smith* and *Coyle* v. *Smith*, none of which was expressly or impliedly overruled in *Frothingham*. The difference in result between these cases and *Frothingham* can only be explained in terms of judicial policy, not constitutional jurisdiction.[4]

4. The majority in the present case did not pass on the question whether *Frothingham* stated a constitutional principle or a rule of policy, since it felt itself bound by the decision in either event (24a). This Court, of course, is under no such restriction and can find that the policy considerations underlying *Frothingham* are inapplicable to the present suit.

C. The Post-*Frothingham* Cases

The decisions of this Court since *Frothingham* uniformly support the conclusion that neither that decision nor the *de minimis* principle upon which it is based presents a constitutional barrier to the present suit. The Court accepted jurisdiction and decided on the merits the controversies in *Cochran* v. *Louisiana State Board of Elections*, 281 U. S. 370 (1930), *Everson* v. *Board of Education*, *supra*, *Adler* v. *Board of Education*, 342 U. S. 485 (1952), *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), and *Harper* v. *Virginia State Board of Education*, 383 U. S. 663 (1966). Other non-taxpayer suits similarly establish that the fact that the plaintiff's interest may be so minute as might be categorized as *de minimis* does not constitute a constitutional bar to adjudication. Among these are *Engel* v. *Vitale*, 370 U. S. 421 (1962) and *Baker* v. *Carr*, 369 U. S. 186 (1962).

Cochran v. *Louisiana State Board of Education*, *supra*, decided seven years after *Frothingham*, was an appeal from a state court decision in a taxpayer's suit challenging as a violation of substantive due process the furnishing of textbooks for use in parochial schools. This Court accepted the appeal and decided the issue on the merits.

Everson was a taxpayer's suit challenging the constitutionality of a state statute authorizing the payment by local boards of education of the cost of transporting children to parochial schools. The Court accepted jurisdiction of an appeal from the state supreme court's decision upholding the validity of the statute under the First Amendment. Nothing in the Court's decision intimates the slightest

doubt that it had jurisdiction to review the state court's decision. This implicit assumption of constitutional power to decide is particularly significant in view of the Court's action five years later in *Doremus* v. *Board of Education, supra,* wherein it refused to pass on the merits of a controversy because it found no "case or controversy" to be present.

In the present case, the majority in the court below cited *Doremus* in support of its dismissal of the complaint (24a). Yet, a careful reading of the decision indicates that it supports the position of the appellants herein rather than contradicts it. The case involved a suit by the parent of a public school pupil and by a taxpayer challenging Bible reading in the public schools. The Court dismissed the appeal from a state court decision, upholding the practice, on the ground that the issue had become moot in respect to the first plaintiff by reason of the fact that his child had graduated from the public school before the appeal was taken and that the second, the taxpayer-plaintiff, had no standing to sue. In support of its decision, the Court cited *Massachusetts (Frothingham)* v. *Mellon.*

Citation of and reliance upon *Frothingham* indicates clearly that the Court found no difference between suits against the United States and suits against States and municipalities as far as constitutional jurisdiction is concerned. Hence, if the Federal courts had constitutional jurisdiction in *Bradfield, Everson* and all the other cases discussed herein, it has constitutional jurisdiction of the present case even if it be deemed a suit against the Federal Government rather than the Board of Education of the City of New York.

The Court distinguished (not overruled) *Everson* on a ground which requires distinction of the present case. The Court said that "Everson showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not."

By this the Court meant and only could have meant that the plaintiff-taxpayer had not alleged any (unconstitutional) expenditure of public funds. Obviously, an injunction suit against expenditure of funds cannot be entertained where there is no allegation that there had been any expenditure. A completely different situation would have been presented had the complaint sought an injunction not against Bible reading but against the expenditure of public funds for the purchase of Bibles for use in public school devotional exercises. In such case, the situation would have been the same as that in *Everson* (and *Bradfield* v. *Roberts, Cochran, Hawke* v. *Smith,* and the other cases heretofore cited in which the Court took jurisdiction in taxpayers' suits). It would also have been the same as the present case, which does allege "a measurable appropriation or disbursement of * * * [public] funds occasioned solely by the activities complained of."

It is, we submit, beyond the bounds of rationality to assert that the Constitution authorizes a Federal court to forbid a State's violation of the First Amendment in a suit brought by a resident whose pecuniary injury is measured by his interest in the expenditure of $357.74 by a town of over ten thousand inhabitants, whereas it may not forbid such a violation where the plaintiff cannot show such minute pecuniary injury to himself. Such a distinc-

tion smacks of medieval magic rather than law or logic. *Everson* or *Doremus* can be reconciled only on the basis of the fact that some expenditure was made by the State of New Jersey in the former case but not in the latter, rather than on the basis of the pecuniary injuries suffered by the respective plaintiffs.

The constitutional test, therefore, can only be the public expenditure, not the extent of the plaintiff's particular injury as a result of that expenditure. If the Constitution permits a single taxpayer to sue to prevent a state expenditure of $357.74, it certainly permits seven taxpayers to join in a suit to prevent a Federal expenditure of many millions of dollars in violation of that Constitution.

On the same day that this Court decided *Doremus* it also decided *Adler* v. *Board of Education, supra.* There, over the vigorous dissent of Mr. Justice Frankfurter, the Court took jurisdiction and passed on the merits of a suit by eight taxpayers challenging the constitutionality of the New York public school teachers' loyalty law. The following from the dissenting opinion so clearly presents the argument against acceptance of Federal jurisdiction in taxpayers' suits that it warrants being set forth here (342 U. S. at 501-502):

> About forty plaintiffs brought the action initially; the trial court dismissed as to all but eight. 196 Misc. at page 877, 95 N.Y.S. 2d 114. The others were found without standing to sue under New York law. The eight who are here as appellants alleged that they were municipal taxpayers and were empowered, by virtue of N. Y. Gen. Municipal Law §51, McK. Consol. Laws, c. 24, to bring suit against municipal agencies

to enjoin waste of funds. New York is free to determine how the views of its courts on matters of constitutionality are to be invoked. But its action cannot of course confer jurisdiction on this Court, limited as that is by the settled construction of Article III of the Constitution. We cannot entertain, as we again recognize this very day, a constitutional claim at the instance of one whose interest has no material significance, and is undifferentiated from the mass of his fellow citizens. Doremus v. Board of Education, 342 U. S. 429. This is not a "pocketbook action." As taxpayers these plaintiffs cannot possibly be affected one way or the other by any disposition of this case, and they make no such claim. It may well be that the authorities will, if left free, divert funds and effort from other purposes for the enforcement of the provisions under review, though how much leads to merest conjecture. But the total expenditure, certainly the new expenditure, necessary to implement the Act and Rules may well be *de minimis*. The plaintiffs at any rate have not attempted to show that any such expenditure would come from funds to which their taxes contribute. In short, they have neither alleged nor shown that our decision on the issues they tender would have the slightest effect on their tax bills or even on the aggregate bill of all the City's taxpayers whom they claim to represent. The high improbability of being able to make such a demonstration, in the circumstances of this case, does not dispense with the requirements for our jurisdiction. If the incidence of taxation in a city like New York bears no relation to the factors here under consideration, that is precisely why these taxpayers have no claim on our jurisdiction.

But, notwithstanding these vigorous words, the Court did take jurisdiction, and none of the other eight Justices expressed any doubt as to the correctness of doing so. Cer-

tainly, the most reasonable if not the only explanation for this is that they did not consider taxpayers' suits beyond the Federal courts' judicial power under Article III.

It should be noted too that the statement in the quoted paragraph that the Court's decision would not have the slightest effect "on the aggregate bill of all the City's taxpayers whom they [the plaintiffs] claim to represent" does not apply to the present case. Obviously, Federal expenditures of the many millions of dollars for the support of sectarian schools which is almost certain to result if this Court disallows jurisdiction in the present suit, will surely have a substantial effect on the aggregate bill of all the taxpayers in whose behalf this class action has been brought. It may therefore well be that even Mr. Justice Frankfurter would have agreed to the assumption of jurisdiction in this case. This conclusion is supported by the fact that later in the same year as *Doremus* and *Adler* he concurred, without raising the jurisdictional question, in *Wieman* v. *Updegraff*, *supra*.

This was a suit by citizens and taxpayers of the State of Oklahoma to enjoin public officials from paying further compensation to employees who had not subscribed to a loyalty oath prescribed by a state statute. This Court accepted an appeal from the state court's decision and held the statute unconstitutional.[5]

5. It is true that public employees affected by the statute intervened in the suit and were the appellants in this Court. But that does not alter the fact that the *plaintiffs* were taxpayers. This was not a suit by dismissed public employees against the State to compel reinstatement or payment of salaries. Between them and the State there was no case or controversy, else there would have been no need for a taxpayer's suit against the State. Were the taxpayers to have been held wanting in standing the appeal to this Court would have presented at best a quest for an advisory opinion, which the Court certainly would have rejected.

The most recent case in which a tax can fairly be deemed *de minimis* was involved is *Harper* v. *Virginia State Board of Elections, supra.* There this Court found no difficulty in sustaining the right of a citizen to sue in the Federal courts for judgment declaring unconstitutional a state law imposing a poll tax of $1.50 as a prerequisite to voting. One dollar and fifty cents does not, we suggest, rise above *de minimis* but that fact did not prevent the Court from declaring the law to be unconstitutional.

Two other post-*Frothingham* decisions are relevant, *Engel* v. *Vitale, supra,* and *Baker* v. *Carr, supra* (and its successors, such as *Wesberry* v. *Sanders,* 376 U. S. 1 (1964)). While these were not taxpayers' suits they both involve the question of *de minimis* and both support our contention that that concept does not constitute a constitutional barrier to this suit.

Engel was a suit to enjoin the public school sponsored recitation of a so-called non-sectarian prayer formulated by the New York Board of Regents. The prayer consisted of 22 words whose recitation could barely have taken ten seconds—certainly *de minimis* if that standard is applicable to a suit under the First Amendment. In response to the *de minimis* claim, the Court said (370 U. S. at 436):

> It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that because

the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

> "[I]t is proper to take alarm at the first experiment on our liberties. * * * Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"

Baker v. *Carr, supra,* was predicated on the claim that the plaintiffs' votes were "debased" or devalued by reason of malapportionment. But certainly an individual citizen's proportionate interest in a State or Federal legislator would seem to be about as close to *de minimis* as one can get. Our national population has now reached 200 million so that on the average each of the 435 Congressmen represents more than a half a million Americans. Nevertheless, the Court held an individual's interest sufficient to support a suit asserting not that that interest had been destroyed but only that it had been devalued and thus made even more minute.

It should be noted that although Justice Frankfurter and Harlan dissented, neither did so on the ground that the plaintiffs lacked standing to sue, but only that the question raised was political and hence non-justiciable. This, we suggest, is particularly significant in view of the assertion

in the Court's opinion (p. 206 fn. 27) that Mr. Justice Frankfurter's opinion in *Colegrove* v. *Green*, 328 U. S. 549 (1946) did *not* rest on the appellants' lack of standing.

D. The Constitutional Authorities

In view of these decisions, as well as others that could be cited,[6] it is hardly surprising that it is almost a universal consensus among recognized constitutional authorities that *Frothingham* imposes no constitutional barrier to the present suit. This consensus is summed up in the statement of Professor Paul Freund to the Senate Subcommittee considering judicial review (Hearings, *supra*, p. 499) that "The defect in Federal taxpayer's suits does not rise to the level of an article III infringement." See also statements of Professors Louis L. Jaffe (p. 444), Kenneth Culp Davis (pp. 492, 497), Robert G. Dixon, Jr. (p. 510), Paul G. Kauper (p. 501), Arthur S. Miller (p. 530) and Arthur E. Sutherland (p. 535). It is also significant that although the present Solicitor General, in his then capacity as dean of Harvard Law School, opposed the broadening of S. 2097 to encompass non-First Amendment taxpayers' suits, he did not oppose enactment of the bill in its then form. Moreover, his opposition to the broadening of the measure was not based upon constitutional grounds, but only on policy. (Hearings, p. 496).[7]

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6. *E.g.*, *Smiley* v. *Holm*, 285 U.S. 355 (1932); *Koenig* v. *Flynn*, 285 U.S. 375 (1932); *Coleman* v. *Miller*, 307 U.S. 433 (1939); *Wood* v. *Broom*, 287 U.S. 1 (1932); *McCollum* v. *Board of Education*, 333 U.S. 203, 206 (1948).

7. See, also: Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265 (1961); 3 Davis, *Administrative Law*, Sec. 22.09 (1958); Davis, Standing to Challenge Governmental Action, 39 Minn. L. Rev. 353 (1955); Note, *Taxpayers' Suits*, 69 Yale L.J. 895 (1960); Dorsen, *The Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit*, 12 Buffalo L. Rev. 35 (1962).

To close this Point of our brief, we note that the Senate of the United States agrees with our contention that neither *Frothingham* nor any other decision of this Court stands in the way of Federal court determination of the present action. By passing S. 3, 90th Congress, 1st Session, which would authorize taxpayers' suits to enjoin violation of the First Amendment no-establishment clause through the expenditure of Federal funds, the Senate clearly expressed its opinion that such suits are within the competence of the Federal judiciary under Article III. While, of course, such expression of opinion is not binding upon this Court, it is, we submit, entitled to great weight, particularly since no member of the Senate Committee on the Judiciary or of the Senate itself indicated any dissent from the conclusion. See, Senate Report No. 85, 90th Congress, 1st Session, to accompany S. 3.

POINT II

The factors which dictated judicial restraint in *Frothingham* have no equivalent validity today and in any event have no relevance to a suit under the First Amendment.

A. The Specter of Multitudinous Suits

"Every opinion," said John Marshall, "to be correctly understood ought to be considered with a view to the case in which it was delivered." *United States* v. *Aaron Burr*, 4 Cr. 470, 482 (1807). The dismissal of the complaint in *Frothingham* must be understood in the context of the controversy presented for adjudication, as well as of the time in which it was presented. The complaint sought a determination that the due process clause of the Fifth Amend-

ment forbade Congress to expend Federal funds for such social welfare purposes as providing maternity benefits for indigent child-bearing women. The period in which *Frothingham* was decided was well described by this Court in *Ferguson* v. *Skrupa*, 372 U. S. 726, 729 (1963):

> * * * There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, outlawing "yellow dog" contracts, setting minimum wages for women, and fixing the weight of loaves of bread. (Citations omitted)

Measured by the standards of that period the Court would have found it difficult to decide against Miss Frothingham on the merits or to uphold the validity of the Maternity Act. Moreover, a decision on the merits would also have threatened all other Federal social welfare legislation at a time when such legislation was already commonplace throughout the world.[8] This dilemma was avoided by using a device which had never before been used to dismiss such an action (no authority was cited in *Frothingham* to support the decision)—the plaintiff's lack of a definite and measurably sufficient pecuniary interest in the outcome to justify his suit.[9]

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8. Great Britain, for example, had enacted a national unemployment insurance law as early as 1911. Clarke, *Social Legislation*, p. 477 (1957).

9. See, Finkelstein, *Judicial Self-Limitation*, 37 Harv. L. Rev. 338, 359-361 (1924) for a somewhat similar explanation of *Frothingham*.

Even if determination of *Frothingham* on the merits would have culminated in a decision upholding the validity of the statute, the constitutional law of the period would have required a full-scale consideration of the merits. It would have required similar full-scale consideration of any number of other suits attacking similar social welfare legislation. It is therefore not surprising that the Court should say (262 U. S. at 487):

> * * * If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. * * *

As *Ferguson* v. *Skrupa, supra,* indicates, the constitutional law of the *Frothingham* era is no longer with us and is not likely to return, at least in the foreseeable future. Today the prospect of success in suits such as *Frothingham* is so remote that they are rarely brought. There is, however, no way for the courts to prevent the institution of lawsuits, no matter how patently meritless they are. *(Cf. Zucht* v. *King,* 260 U. S. 174 (1922)). All a court can do is dismiss the suit at the earliest opportunity.

But a court cannot do more where the plaintiff lacks standing to sue. *Frothingham,* no matter how often reaffirmed, cannot prevent the institution of taxpayers' suits. Dismissal of a suit for patent insubstantiality entails no

greater inconvenience upon a court than dismissal for want of standing. Hence, the fear allowing *Frothingham*-type suits would result in embarrassing inconveniences to the Federal courts, while perhaps valid in 1923, has no validity today.

Experience fully supports this conclusion. With the possible exception of New Mexico[10] and New York (and even the latter allows taxpayers' suits against municipalities[11]), probably every state in the Union allows suits by taxpayers to prevent unconstitutional expenditures of state funds, or at least does not clearly bar them (Note, 69 Yale L.J. 894, 900-901). None of these states has found its courts to be inundated with meritless taxpayers' suits; at least, none has found it necessary to change its law to bar such suits. There is, therefore, not the slightest indicia of empiric evidence to justify the fear of multitudinous suits expressed in *Frothingham*, even if such suits were allowed in all kinds of cases including *Frothingham*-type controversies, and certainly not if such suits were allowed only in First Amendment controversies—which is all that is asserted here.

We suggest, finally, that even if the fear of multitudinous suits expressed in *Frothingham* were valid, that fact would not alone justify denial of the right to sue in the present case. Convenience is not necessarily the highest value in a democratic society. First Amendment freedoms are precious, and their preservation may require us to put

10. But cf. *Miller* v. *Cooper*, 56 N.M. 355 (1952); Davis, Standing to Challenge Governmental Action, 39 Minn. L. Rev. 353, 388-89 (1955).

11. See *Adler* v. *Board of Education*, *supra*.

up with many inconveniences, such as littered streets (*Schneider* v. *Irvington, New Jersey,* 308 U. S. 147 (1939)), blaring amplifiers (*Saia* v. *New York,* 334 U. S. 558 (1948)), unwelcome doorbell ringers (*Martin* v. *Struthers,* 319 U. S. 141 (1943)) and expensive police protection for racist rabble-rousers (*Terminiello* v. *Chicago,* 337 U. S. 1 (1949)). Freedom from establishment of religion and compulsory taxation for religious purposes is no less precious than the other freedoms secured by the First Amendment and if the price of maintaining it is suffering a multitude of meritless suits, the bargain may nevertheless be very much worthwhile.

B. *De Minimis* and Concrete Adverseness

In *Baker* v. *Carr, supra,* the Court said (369 U. S. at 204) that the gist of the question of standing is whether the plaintiffs have "alleged such a personal stake in the outcome of the controvery as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Applied to the *de minimis* rule, this presumably means that if a plaintiff's stake in the outcome is minute there will not be the necessary incentive to assure concrete adverseness.

This assumption may have validity in a *Frothingham*-type suit. There the only interest sought to be protected was pecuniary and the suit itself was analogized to one by a stockholder of a private corporation or a taxpayer of a municipal corporation to prevent the waste of corporate assets through unauthorized or unlawful expenditures. The latter suits may be maintained because the plaintiffs' interests are relatively large (and, presumably therefore,

will be vigorously defended) while the former may not because the interest sought to be protected is minute. Few people, it may be assumed, will spend a lot of money in vigorously prosecuted litigation to save a little money in increased taxation.

But the plaintiffs in the present suit and in similar First Amendment suits are not watchdogs of the public treasury. They are not motivated by any desire to keep taxes down. They sue, in the phraseology of *Doremus*, to prevent a pocketbook injury but only because that is part of what they deem a much graver injury, an injury to the right to live under a government which separates itself strictly from the church and church affairs.

Is it not reasonable to assume that litigants so motivated will have "a personal stake in the outcome of the controversy" at least as great as that possessed by taxpayers suing only to save themselves some money? Is it not probable that the adverseness in their suit will be no less concrete than that in the ordinary municipal taxpayer's suit? Was *Bradfield* v. *Roberts*, which sought to enjoin the United States Treasurer from paying funds to a religious group less vigorously prosecuted than *Millard* v. *Roberts*, which sought to enjoin the same United States Treasurer from paying public funds to the Baltimore and Ohio Railroad?

The answer to the question and the crux of the matter lies in the fact that to many Americans monetary concerns do not occupy the highest station in the hierarchy of values and that other values will be defended in the courts with no less vigor and robustness.[12]

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12. In the present case, the number and nature of the *amici curiae* on both sides assure robust and vigorous adverseness.

C. *De Minimis* and the Establishment of Religion

Neither *Frothingham* nor the *de minimis* concept on which it is based, we submit, has validity in a suit asserting a violation of the First Amendment. As Mr. Justice Stone stated in holding that the $3,000 jurisdictional minimum imposed by §24(1) of the Judicial Code did not bar a suit to enjoin suppression of speech and assembly,

> * * * There are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money valuation, and in many instances, like the present, no suit in equity could be maintained for their protection if proof of the jurisdictional amount were prerequisite. We can hardly suppose that Congress, having in the broad terms of the Civil Rights Act of 1871 vested in all persons within the jurisdiction of the United States a right of action in equity for the deprivation of constitutional immunities, cognizable only in the federal courts, intended by the Act of 1875 to destroy those rights of action by withholding from the courts of the United States jurisdiction to entertain them. (*Hague* v. *C.I.O.*, 307 U. S. 496, 529 (1939)).

What is true of the First Amendment right to freedom of speech and assembly is, we submit, no less true of the First Amendment rights to freedom from an established church and coerced taxation for religion. As early as 1785, when Madison wrote in his monumental Memorial and Remonstrance the warning against a "three-pence" establishment in the extract from *Engel* v. *Vitale*, which we have set forth above (p. 30), it has been recognized that it is the fact of governmental encroachment on the domain of

religion and not the extent of that encroachment which violates the principle of church-state separation. It was recognized in the classic interpretation of the no-establishment clause first expressed in *Everson,* and since reiterated three times,[13] wherein the Court said (330 U. S. at 15-16):

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax *in any amount, large or small,* can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis added.)

It was recognized by Mr. Justice Rutledge in his dissent in *Everson,* which to him was not "just a little case over bus fares" (*supra,* 330 U. S. at p. 57), wherein he asserted (at p. 63):

> • • • The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate

13. *McCollum* v. *Board of Education, supra,* 333 U.S. at 210-11; *McGowan* v. *Maryland,* 366 U.S. 420, 443 (1961); *Torcaso* v. *Watkins,* 367 U.S. 488, 492-493 (1961).

> the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. * * *

It was recognized too in *McCollum* v. *Board of Education, supra.* In that case, the Illinois trial and Supreme Courts had found (Record, pp. 78-79, 275; 396 Ill. 14) that the expense incurred by the public school system as a result of the program of released time for religious instruction (wear and tear on furniture, electric current on dark days, etc.) was so slight as to fall within the *de minimis* rule. The same argument was pressed before this Court by the appellees in that case, but the Court refused to accept it.

It was recognized again in *Engel* v. *Vitale, supra,* in the extract which we have already quoted.

Finally, it was recognized in the last establishment case this Court has decided, *School District of Abington Township* v. *Schempp,* 374 U. S. 203 (1963), wherein the Court said (at p. 225):

> * * * [I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties." * * *

In the light of these expressions, it is hardly surprising that this Court has never rejected an establishment

ease on the basis of *Frothingham* or the *de minimis* policy on which it is premised.[14] As we have indicated (*supra*, p. 24), *Doremus* is no exception.

D. *De Minimis* and the Free Exercise of Religion

The present suit is based not only on the Establishment but also on the Free Exercise Clause of the First Amendment. The complaint sets forth a separate and independent count asserting that the use of Federal funds to finance sectarian schools constitutes compulsory taxation for religion and is therefore a violation of the plaintiffs' free exercise of religion. Fundamental to the concept of religious freedom, as envisaged by the Framers, was the belief that was destructive of personal freedom to compel any man to pay taxes for the support of religion. Indeed, the history of the struggle for religious freedom in America is in large measure the history of the struggle against taxation for religious purposes.[15] It was the effort to enact just such a statute for financing religious schools in Virginia that gave rise to that state's adoption of Jefferson's

14. The decisions cited in Point I of our brief indicate that the same is true in respect to all other constitutional law cases other than the substantive due process property type of suit involved in *Frothingham* and which today would in any event be barred by the principle most recently reaffirmed in *Ferguson* v. *Skrupa*, *supra*.

15. As the Court said in the *Everson* case, *supra*, 330 U. S. at 11:

> These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty.

Bill for the Establishment of Religious Freedom which was the basis of both the establishment and free exercise provisions of the First Amendment.

Where free exercise is concerned, the Court has never deemed quantitative considerations of relevance. Indeed, it would contravene the proscriptions set forth in *United States* v. *Ballard,* 322 U. S. 78 (1944) and *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94 (1952) for a court or any other agency of government to pass judgment on whether a particular infringement on the free exercise of religion is of substantial or minimal weight. All religions are based upon symbolism (*cf. West Virginia State School Board of Education* v. *Barnette,* 319 U. S. 624 (1943)) and compulsory taxation even to the extent of "three pence" may violate the taxpayer's conscience no less than taxation to the extent of three thousand dollars. It was not the amount of the tax that sent Thoreau to jail, it was the fact that the tax in any amount violated his conscience. Similarly, it was only a symbol that kept Rosika Schwimmer from American citizenship, for it was hardly likely that a 60-year-old woman would ever be called on to take arms in defense of her country. *United States* v. *Schwimmer,* 279 U. S. 644 (1929).

Here, too, the *de minimis* concept on which *Frothingham* relied is inapplicable. Although *Engel* v. *Vitale* was decided on the basis of establishment rather than free exercise, can it be doubted that if compulsion had been present there a violation of free exercise would have been found even though recitation of the 22-word prayer took little more than a few seconds? The point of these cases is that

the *de minimis* concept is of no relevance in cases challenging government action on the ground that it violates religious conscience.

E. *Frothingham* and the Separation of Powers

There is a suggestion in *Frothingham* (262 U. S. at 488-89) that the acceptance of jurisdiction there would have been inconsistent with the principle of the separation of powers and that to issue an injunction against the expenditure authorized by Congress would be "to assume a position of authority over the governmental acts of another and co-equal department" of the government. This suggestion undoubtedly had substantial validity in the situation presented in *Frothingham*, but only as a matter of judicial policy. To hold it a matter of constitutional jurisdiction would require overruling of *Marbury* v. *Madison*, *supra*, for whenever the Court exercises its responsibility of judicial review it is assuming "a position of authority" over the acts of Congress, an authority based on the premise of the supremacy of Constitution over statute.

The Constitution, Marshall pointed out in *Marbury* (1 Cr. at 179), forbids Congress to enact a bill of attainder and requires the courts not to give effect to it should Congress nevertheless enact it, although this is clearly assuming "a position of authority" over an act of a co-equal branch of the government.

Because the Constitution forbids Congress to enact a bill of attainder, the Court required the Government to pay the salaries of Lovett, Watson and Dodd, even though the Constitution (Art. I, §9) delegates to Congress the power

of the purse and forbids the payment of any Federal money except in conseqeunce of an appropriation made by Congress. *United States* v. *Lovett,* 328 U. S. 303 (1946).

But as the Constitution prohibits Congress to enact a bill of attainder, no less explicitly does it prohibit it to enact a law respecting an establishment of religion. And if the Court may require a payment because the refusal of Congress to authorize it was a bill of attainder, it may, we submit, equally require non-payment because its authorization was a law respecting an establishment of religion.

The argument that resort should be had to Congress rather than the courts is particularly inapposite in a First Amendment case. As the Court said in *Schempp* (374 U. S. at p. 226), quoting *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638 (1943):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

We emphasize strongly, as this Court has done in all establishment cases from *Everson* through *Schempp,* that the establishment of religion clause is as much a part of the First Amendment as is every other guarantee in that opening paragraph of the Bill of Rights, and that the right

to freedom from an establishment of religion is one of the "fundamental freedoms" which "may not be submitted to vote" and which "depend on the outcome of no election."

POINT III

Important policy considerations dictate assumption of jurisdiction in this case.

We could rest our case at this point for we have established, we believe, that neither *Frothingham* nor the *de minimis* principle on which it is based bars this suit either on constitutional or on policy grounds, and there is therefore no reason why this case should be treated differently from any other case presenting a Federal question. At the very least, the burden is on the Government to establish why this suit should not be entertained. However, we go further and set forth a number of weighty considerations which dictate that this case should be heard and decided by the Federal courts.

A. The Justiciability of the Issues

This case raises exactly that type of legal issue which, ever since *Marbury* v. *Madison*, it has been the function of the judiciary to resolve. If the expenditures challenged herein had been made by State officials, there is no question that the issues would ultimately be decided by this Court; even *Doremus* would not stand in the way. Yet the constitutional questions are not different merely because the expenditures are made by Federal officials. They are legal questions which appropriately should be decided by a court.

of law. As the Court said in *West Virginia State Board of Education* v. *Barnette, supra,* it is the judiciary to whom is assigned responsibility for "the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century. * * *". (319 U. S. at 639.) There were no public schools, no parochial schools and no Federal support of either in 1791 and therefore no specific intent as to the applicability and effect of the First Amendment to the situation in the present case. The translation of the generalities into concrete restraints, therefore, can be effected only by the courts.[16]

B. The Need for Authoritative Determination

If the Federal courts close their doors to suits such as the present one, there is no other legal forum to which the litigants or anyone else can turn to for an authoritative determination of important and difficult constitutional and legal questions. Lawmakers and administrators would lack the guidelines which they need to enable them to carry out their functions within constitutional limitations, guidelines which only this Court can provide. Since Article III does not permit advisory opinions, these guidelines can be provided only by means of a lawsuit such as the present one.

16. Judicial responsibility for the translation of eighteenth century generalities to twentieth century specifics is not limited to the First Amendment but applies to all of the Constitution. It is because the judiciary has fulfilled this responsibility that a document written in the eighteenth century has survived and remains viable and vigorous in the nuclear age. *McCulloch* v. *Maryland,* 4 Wheat 316 (1819) is, of course, the supreme example of creative judicial discharge of this responsibility, but every time a Federal court interprets and applies a constitutional provision, it is in effect engaging in the process of what might be called continuing *aggiornamento.*

It would be a matter of great misfortune if the Court would allow the all but invisible difference between the pecuniary injury suffered by a Federal taxpayer from that suffered by a State taxpayer to stand in the way of providing these needed guidelines. The matter was well put by Professor Davis in the following words:

> Much is lost by continued uncertainty about the constitutionality of proposed spending programs. Congress is guided by the courts as to the constitutionality of other action but not as to the constitutionality of spending. Debates in Congress about the constitutionality of federal aid to parochial schools did not and could not settle the issue, and they impeded the legislators from focusing upon the merits of proposals. Congressmen and others flounder when the courts are cut off from resolving constitutional issues. Because we have the habit of looking to the courts on such issues, we need their help. Our historical background makes us dependent on the courts. Unplanned and accidental arrangements should not be allowed to cut down the availability of courts when they are needed. (Davis, *"Judicial Control of Administrative Action": A Review,* 66 Colum. L. Rev. 635, 665 (1966).)

The extent, if any, to which the Federal funds allocated by the Elementary and Secondary Education Act of 1965 can constitutionally be used to support instruction in parochial schools is a question that only this Court can definitively determine. That such a determination is of national importance is indicated by the statement of the defendant, Harold Howe, United States Commissioner of Education, according to a news report in the *New York Times* of November 19, 1966, "that the courts would have to clarify what Federally financed services could be given to students in church-related schools" and that, "without

court rulings * * * Federal and state education agencies will continue to have problems."

Not only legislators and administrators need this Court's definitive determination; so too does the general public. It is an unhealthy condition for millions of citizens and taxpayers to be in a frustratingly unresolvable and continuing doubt as to whether their government is violating the national charter. True enough, in respect to certain issues deemed by the Court to be non-justiciable[17] and hence not within its competence under Article III, this is unavoidable. But, as we have sought to establish in Point I of this brief, this is not so in respect to the issues raised in the present controversy.

C. The Courts as Guardians of our Rights

When Madison was preparing for the introduction into the first Congress of a resolution for the addition of a bill of rights to the Constitution, he wrote to Jefferson outlining the arguments he would present. Jefferson agreed but added "the legal check which it puts into the hands of the judiciary." (5 *Documentary History of the Constitution,* 161.) Madison accepted the suggestion, and in his speech accompanying his proposal for what was to become the Bill of Rights, he said:

> * * * If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Ex-

17. Even questions once held to be non-justiciable are later adjudicated. *Cf. Colegrove* v. *Green,* 328 U. S. 549 (1946) with *Baker* v. *Carr, supra.*

ecutive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the Declaration of Rights. (1 Annals of Congress, 1st Cong. 1st Sess., 439.)

It need hardly be noted that neither Jefferson nor Madison would have excluded the establishment and free exercise provisions of the First Amendment from the legal check which the Bill of Rights put into the hands of the judiciary, or from the guardianship of independent tribunals of justice.

The struggle for religious liberty and against church establishment was the first and most universal of the struggles in the colonies.[18] More than any it led to the inclusion of a Bill of Rights into the Constitution. It would be strange indeed if by reason of a decision of this "independent tribunal of justice" freedom from established religion would alone be beyond the mantle of judicial protection.

D. The Preferred Position of First Amendment Rights

As Judge Frankel pointed out in his dissenting opinion in the court below (44a), this Court has recognized that "the usual rules governing standing" (*Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965)) may require exceptions where First Amendment freedoms are in issue. Substantively, too, this Court has recognized and given effect to the preferred position of First Amendment rights. The usual presumption of constitutionality supporting legislation is balanced, in legislation affecting rights secured by

18. As early as 1644, a tanner named Briscoe in Massachusetts Bay Colony published a pamphlet against the church tax, arguing that such method of supporting religion was immoral and contrary to justice. Cobb, *The Rise of Religious Liberty in America*, p. 170 (1902).

the First Amendment, by "the preferred place given in our scheme to the great freedoms secured by the First Amendment." *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945); *Marsh* v. *Alabama,* 326 U. S. 501, 509 (1946); *Prince* v. *Massachusetts,* 321 U. S. 158, 164 (1944). Ordinarily, if a situation exists requiring legislative action, it is for the legislature and not the courts to determine the appropriateness of a proposed remedy, and the courts may not interfere unless the legislature's act was patently unreasonable. But for legislation abridging liberty secured by the First Amendment, a more rigorous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas* v. *Collins, supra,* 323 U. S. at 530. "Mere legislative preference for one rather than another means of combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill* v. *Alabama,* 310 U. S. 88, 95-96 (1940). See also *Sherbert* v. *Venner,* 374 U. S. 398, 406 (1963).

Therein lies the crucial difference between the present case and *Frothingham.* Were *Frothingham* to be decided today on the merits, the courts would accord Congress the greatest latitude and would without hesitation uphold its actions since they could not be said to be patently unreasonable. Should the present case reach the merits stage, the legislation and its implementation would be subject to an "exacting judicial scrutiny." *United States* v. *Carolene Products Company,* 304 U. S. 144, 152 fn. 4 (1938). It would, we submit, be self-contradictory for the

Court on the one hand to impose upon itself an obligation of exacting scrutiny while at the same time to refuse to exercise any scrutiny at all by reason of an equally self-imposed rule of standing.

E. Anomaly in Federalism

Judge Frankel, in his comprehensive dissenting opinion in the court below, pointed to the anomaly in federalism which would result if *Frothingham* were held to bar the present suit. The Constitution expressly forbids Congress from making a law respecting an establishment of religion. It imposes that limitation on the States only indirectly and by implication through the Fourteenth Amendment. It would be strange indeed if, in actual practice, Congress could make such a law but a State could not.

It has been the clear policy of this Court to make uniform the judicial protection accorded to constitutional rights from Federal and State impairment. From *Gitlow* v. *New York*, 268 U. S. 652 (1925) to *Washington* v. *Texas*, 87 S. Ct. 1920 (1967), the clear thrust of this Court's decisions has been to make applicable to the States with equal vigor the limitations imposed upon the Federal Government by the Bill of Rights.[19] Conversely, decisions such as *Hurd*

19. There have been dissents. See, Mr. Justice Jackson's dissent in *Beauharnais* v. *Illinois*, 343 U. S. 250, 287 (1952) and Mr. Justice Harlan's dissent in *Roth* v. *United States*, 354 U. S. 476 (1957). But these are predicated on the proposition that because the Fourteenth Amendment forbids deprivation of liberty only if it is without due process of law whereas the First Amendment imposes no such qualification, the States should be accorded greater liberality in the regulation of conduct or expression within the ambit of First Amendment protection. But applying *Frothingham* to the establishment clause would have the directly opposite effect; it would accord the Federal Government greater liberality than possessed by the States—a consequence particularly anomalous in view of the fact that under our system of federalism, education is principally the responsibility of the States.

v. *Hodge*, 334 U. S. 24 (1948), *Bolling* v. *Sharpe*, 347 U. S. 497 (1954), *Wesberry* v. *Sanders*, *supra*, and *Schneider* v. *Rusk*, 377 U. S. 163 (1964), all indicate a strong policy that the right to equality under law secured by the Fourteenth Amendment against state infringement shall be no less secured against the Federal Government, and shall in both cases enjoy the same degree of judicial protection. The Court has done this by, in effect, reading the equal protection clause into the Fifth Amendment (*Schneider* v. *Rusk*, *supra*, 377 U. S. at 168), as it had earlier read the establishment clause into the Fourteenth Amendment (*Everson*, *supra*, 330 U. S. at p. 8).

It would be, we suggest, an anomalous turn in federalism and contrary to the consistent policy of equalizing the meaning and effectuality of our fundamental freedoms if the Court were now in effect to read the establishment clause out of the First Amendment.

F. The Consequence of Abstention

On this motion it must be assumed that the plaintiffs are correct in their assertion that the administration of the Elementary and Secondary Education Act of 1965 in New York and other parts of the nation[20] is unconstitutional—unless the complaint is patently frivolous, which the defendants do not, at least to the present, contend. If so, the consequence of denial of plaintiffs' standing to sue in the present case is that the unconstitutional expenditure of hundreds of millions of dollars raised by compulsory taxation of American citizens will go on unchecked. And even if there be doubt as to the validity of the plaintiffs' assertion

20. See fn. 2 and text thereat. *Supra*, p. 4.

respecting the administration of the Act, dismissal of the complaint on the ground that plaintiffs lack standing to sue can only mean that the courts are equally impotent to restrain an outright gift of Federal funds or property to a church.[21]

Refusal of jurisdiction in the present case will make of the establishment clause what Madison called a "parchment barrier."[22] It will render meaningless the mandate of the

21. This is by no means beyond the realm of probability. It was only President Madison's veto that prevented the grant of Federally owned land to a Baptist church. 1 Richardson, *Messages and Papers of the Presidents*, 489-490 (1900). Under the Surplus Property Act (40 U.S.C. 484(k)), the Government is at the present time turning over to churches many millions of dollars of Federally owned property as what is practically a gift—i.e., ten percent of its real value. See, *Reynolds School District* v. *Gardner*, U.S.D.C. Oregon, Civ. Action No. 66-150. This was a suit brought jointly by a public school district and taxpayers challenging a proposed conveyance of surplus land to the Lutheran Church at ten percent of its value. Although the school district, whose application for the same land had been turned down by the Government, would seem to have a non-common interest in the controversy and therefore standing even under *Frothingham*, the Government moved to dismiss for want of standing. The issue was not decided because the controversy was rendered moot by reason of the fact that the Government, on reconsideration, decided that the property was not surplus after all and withdrew the proposed conveyance to the Lutheran Church. (Information from filed papers in the case.)

In 1962, the Government turned over to the Catholic diocese of Long Island some 22 acres of surplus land on what was formerly the Mitchel Field Air Force Base at ten percent of its value. Similar applications by county authorities and by an Episcopalian group and a Jewish group were turned down. Protests and intervention by a United States Senator led to a grant of land to both the Episcopalian group and the Jewish group (for erection of religious schools), but the refusal to sell to the county at less than full value was not changed. See *New York Times*, Nov. 23, 26, 27, 1962; April 4, May 21, 24, 1963. January 18, 1964; U. S. Congress, Senate, Committee on Government Operations, Hearings on Negotiated Sale of Mitchel Field, 88th Cong., 1st Sess., 1963.

22. Letter of Madison to Jefferson, October 17, 1788 in 5 *Documentary History of the Constitution* 86.

First Amendment that "Congress shall make no law respecting an establishment of religion", at least in the area in which it has always been deemed most relevant—the use of tax raised funds to support religious institutions. Indeed, it is not too much to suggest that the consequence of a decision holding that *Frothingham* bars the present suit would in practical effect be the repeal of that freedom which this Court has said (in *Abington School District* v. *Schempp, supra,* 374 U. S. at 216) "was first in the Bill of Rights because it was first in the forefathers' minds"—freedom from an establishment of religion.

Conclusion

Mr. Justice Rutledge warned in *Everson*:

> Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. * * * In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other. (330 U. S. at 63.)

This Court has been strict in keeping untarnished that part of the establishment side of the religious freedom shield which relates to religious education and observances in the public school. It has been able to do so by setting aside technical legalisms founded upon concepts of standing to sue and *de minimis*. (See, *McCollum, Engel* v. *Vitale,* and *Abington School District* v. *Schempp, supra.* See, also, Sutherland, *Due Process and Disestablishment,* 62 Harv. L. Rev. 1343 (1949), and Sutherland, *Establishment According to Engel,* 76 Harv. L. Rev. 25 (1962).) To check the parallel drive to obtain public funds for the aid and support of religious schools and keep equally untarnished that part of the shield relating to the ban on financing religion through tax-raised funds, the Court, we submit, must be equally strict in refusing to allow similar technical legalisms of standing and *de minimis* to bar the way to substantive determination of the issues raised in this suit. The Court, in sum, must reverse the decision of the court below and remand the case for a trial on the merits.

Respectfully submitted,

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